

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

ROCKY DALE ARMSTRONG, SR.,)	
)	
Petitioner,)	
)	
-vs-)	Case No. CIV-21-489-F
)	
LUKE PETTIGREW, Warden,)	
)	
Respondent.)	

ORDER


Petitioner, Rocky Dale Armstrong, Sr., a state prisoner appearing *pro se*, commenced this action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In response, respondent, Luke Pettigrew, filed a motion to dismiss, seeking to dismiss the petition as time-barred pursuant to 28 U.S.C. § 2244(d)(1), or alternatively, because petitioner failed to exhaust his state court remedies pursuant to 28 U.S.C. § 2254(b)(1)(A). Upon review, United States Magistrate Judge Shon T. Erwin issued a Report and Recommendation, recommending the motion be granted based upon petitioner's failure to exhaust his state court remedies.

In the Report and Recommendation, Magistrate Judge Erwin advised petitioner of his right to file an objection by October 18, 2021, and further advised him that failure to make timely objection waives the right to appellate review of both factual and legal issues therein contained. To date, petitioner has filed neither an objection to the Report and Recommendation nor a request for an extension of time to file an objection. With no objection filed, the court accepts, adopts, and affirms the Report and Recommendation in its entirety.

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts requires the court to issue or deny a certificate of appealability when it enters a final order adverse to the petitioner. When, as here, the court's adverse decision rests on procedural grounds, the court will not issue a certificate of appealability unless the petitioner shows: "[(1)] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right; and [(2)] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). The court, upon review, finds that petitioner cannot make the required showing. Therefore, the court denies a certificate of appealability.

Accordingly, the Report and Recommendation (doc. no. 16) issued by United States Magistrate Judge Shon T. Erwin on September 30, 2021, is **ACCEPTED**, **ADOPTED** and **AFFIRMED**. Respondent's motion to dismiss (doc. no. 13) is **GRANTED** based on petitioner's failure to exhaust state court remedies and **DENIED AS MOOT** based on the petition being time-barred. Petitioner, Rocky Dale Armstrong, Sr.'s Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody (doc. no. 1) is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust state court remedies. A certificate of appealability is **DENIED**.

IT IS SO ORDERED this 8th day of November, 2021.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE